



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS

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Washington, D.C. 20536

File: EAC 01 027 50371

Office: VERMONT SERVICE CENTER

Date: JAN 15 2003

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER:

INSTRUCTIONS:

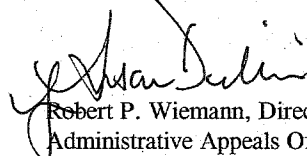
This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The employment-based visa petition was denied by the Director, Vermont Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner is a Virginia corporation engaged in the business of purchasing fishmeal and poultry products for export to China. It seeks to employ the beneficiary as its president and chief executive officer. Accordingly, it seeks to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity for the United States company.

On appeal, counsel for the petitioner asserts that the director erred in his decision and ignored the Service's previous executive classifications of the beneficiary as well as abundant evidence in the record.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers.
-- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The issue in this proceeding is whether the petitioner has established that the beneficiary will be employed in a primarily managerial or executive capacity for the United States entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily-

i. manages the organization, or a department, subdivision, function, or component of the organization;

ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily-

i. directs the management of the organization or a major component or function of the organization;

ii. establishes the goals and policies of the organization, component, or function;

iii. exercises wide latitude in discretionary decision-making; and

iv. receives only general supervision or direction

from higher level executives, the board of directors, or stockholders of the organization.

The petitioner initially described the beneficiary's duties as follows:

As its President [the beneficiary] will personally and independently direct the management of [the petitioner], establish goals and policies. He will supervise and control the work of other managerial staff directly and all other employees indirectly according to the organizational hierarchy of [the petitioner]. [The beneficiary] will be working at the senior most level at [the petitioner], having the ultimate authority to hire, train, and fire employees. [The beneficiary] will exercise absolute discretion over day to day operations of [the petitioner], including top level decision making, however, he will be required to report periodically to the Board of Directors of [the petitioner] and [its parent company].

The petitioner also provided the beneficiary's resume that outlined the beneficiary's duties for the petitioner as follows:

Primarily responsible for the direction and management of the company; establishment of goals and policies in accordance with Board directives; making major recommendations on strategic expenditures, market research, exploratory development, and account opportunities; acting as liaison with parent company and preparing periodic operational and budget reports; assembling new business opportunity profiles; meeting with clients and negotiating contracts; decision-making regarding staffing and training; planning business objectives and developing organizational policies to coordinate functions and operations; developing marketing strategy and expansion of sales and service business [undecipherable] determine progress and status in attaining objectives; evaluating performance of executives; presiding over board of directors; serving as chairman of committees; and exercising a wide latitude of discretionary decision-making authority, including the authority to hire and fire.

The petitioner also provided an organizational chart depicting a president, vice-president, an administrative department, a finance department and a trade department. The chart also indicated the trade department was made up of an import and export division. The petitioner further provided Internal Revenue Service (IRS) W-2 Forms, Wage and Tax Statements issued to five employees for 1999.

The director requested a comprehensive description of the beneficiary's duties including a breakdown of the number of hours

devoted to the job duties on a weekly basis. The director also requested additional details of all of the petitioner's employees.

In response the petitioner provided the following:

[The beneficiary's] duties on any average week can be broadly divided into: designing, developing, initiating, formulating, amending, evaluating, and presiding over the implementation of corporate policies and objectives (6 to 8 hours); maintaining regular communications with the top management of the parent company regarding important financial, budgetary, and quality control matters (8 to 10 hours); decision making and ensuring the execution of procurement and shipment decisions (8 to 10 hours); directing and coordinating the activities of the managerial and supervisory staff and setting short term and long term goals for the subordinates (8 to 10 hours); communications and exchange of information with the executive and managerial personnel of the supplying entities to maintain, develop, and explore business opportunities and associations in the American market and international business arena (8 to 10 hours); developing policies and presiding on implementation of decisions on personnel matters, to include, hiring, training, discharge, promotions, employee benefits and incentives (2 to 4 hours).

The petitioner stated further that the beneficiary's duties included:

1. Regularly hold meetings and discussions, formally and informally, on company status with the Vice President and Managers;
2. Define and implement development strategies;
3. Review accounts, reports, and financial statements and report to the Board of Directors and the parent company;
4. Ultimately responsible for all decisions to hire, fire, train, and manage employees;
5. Develop guidelines to negotiate and execute employment contracts;
6. Direct to develop clear and fair personnel policies on hiring, promotions, payroll, incentives, benefits, and training & development;
7. Direct to supervise staff and periodically evaluate their performance to see conformance with the company objectives;
8. Direct to prepare monthly, quarterly, and annual reports for his review and onward submission to the Board, and parent company;
9. Review and consider recommendations on strategic expenditure, market research, outreach activities,

business meetings, and incentives within the annual budget from the Vice President;

10. Responsible for formulating and administering company policies and developing short term and long term company goals and objectives;

11. Responsible officer for ensuring compliance with all local, state and federal reporting and compliance requirements;

12. Communicate with the top executives of the other business entities to develop networking and contacts, negotiate and sign contracts, attend meetings with the business contacts, and make well-informed decisions;

13. Perform the duties of the Vice President when Vice President is inaccessible or is on tours out of the offices;

14. Coordinate and communicate with the parent company on the periodic development and progress of the company;

15. Constantly evaluate products and policies, and ensure quality control;

16. Develop plans to expand the business and diversification of the company; and

17. Exercise wide latitude of discretionary decision making authority on everyday operations of the company, including but not limited to the above mentioned areas.

The petitioner also noted that it employed the president, the vice-president/general manager, and the trade department manager on a full-time basis. The petitioner further noted that it employed someone for the administrative department on a part-time basis and someone in the finance department on a part-time basis.

The director determined that the petitioner's description of the beneficiary's duties failed to establish that the beneficiary would be performing duties that would be primarily executive or managerial in nature. The director also determined that the described duties of the beneficiary's position when taken in context of the petitioner's staffing arrangement, failed to demonstrate that the beneficiary would be acting primarily as a manager or executive other than in position title.

On appeal, counsel for the petitioner re-states the previously provided job descriptions for the beneficiary. Counsel asserts that these descriptions show that the beneficiary functions at the most senior level and manages professional, managerial, and supervisory personnel. Counsel also submits brief position descriptions of the petitioner's other employees that had been earlier requested by the director. Counsel also asserts that the Service ignores the previous executive classifications granted by the Service.

It is noted that counsel for the petitioner cites certain criteria found in the statutory definition of manager and then concludes

that the Service has previously indicated that the beneficiary had served in an executive capacity. Neither counsel nor the petitioner has effectively clarified whether the beneficiary is claiming to be engaged in managerial duties under section 101(a)(44)(A) of the Act, or executive duties under section 101(a)(44)(B) of the Act. It appears the beneficiary is claiming to be both a manager and an executive and is attempting to rely on partial sections of the two statutory definitions to establish a hybrid "executive/manager." However, a petitioner must establish that a beneficiary meets each of the four criteria set forth in the statutory definition for executive and the statutory definition for manager if the beneficiary is representing he or she is both an executive and a manager.

Counsel's assertions that the beneficiary meets the criteria for either an executive or a manager are not persuasive. In examining the executive or managerial capacity of the beneficiary, the service will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). In the initial petition, the petitioner provided a general description of the proposed duties of the beneficiary essentially paraphrasing two elements of the statutory definition of executive and two elements of the statutory definition of manager. The beneficiary's job description as found in his resume did not further expound upon the beneficiary's actual daily duties. The beneficiary's duties were generally stated as making recommendations, acting as a liaison with the parent company, decision-making regarding staffing and training, planning business objectives, and developing organizational policies. In addition, the beneficiary's duties included preparing reports, meeting with clients and negotiating contracts, assembling new business opportunity profiles, and developing marketing. It is not possible to determine from these general statements whether the beneficiary is performing managerial or executive duties with respect to these various activities or whether the beneficiary is actually performing the activities.

In response to the director's request for evidence the petitioner submitted a lengthy but vague description of the beneficiary's duties. The petitioner essentially substituted various synonyms for the concept of establishing corporate policies for the petitioner, indicated that the beneficiary talked with the parent company and the petitioner's suppliers to continue to develop business opportunities, ensured procurement and shipping, and worked with the other staff of the petitioner. This vague description does not convey an understanding of what the beneficiary accomplishes in his daily activities. In addition, the lengthy list of duties provided by the petitioner used slightly different words to indicate that the beneficiary held meetings with the staff, the parent company, and other businesses, developed strategies, and evaluated and administered policies, reviewed reports, and worked with the petitioner's other personnel. Again, the Service cannot determine from these general

and vague descriptions what the beneficiary is doing on a daily basis. The Service cannot find that the duties described are indicative of an individual primarily performing managerial or executive duties. The Service cannot conclude based on these descriptions that the beneficiary has met all the criteria set forth in either the definition of managerial or executive capacity.

Counsel's assertion that the descriptions provided by the petitioner show that the beneficiary functions at the most senior level and manages professional, managerial, and supervisory personnel is not supported in the record. Going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). The beneficiary at most is performing the necessary day-to-day operations of the petitioner in order to maintain the petitioner's business and is acting as a first-line supervisor of non-professional, non-managerial, and non-supervisory employees.

The beneficiary's performance of the necessary duties to operate the business does not qualify the beneficiary as an executive or manager. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988).

The beneficiary's work with the personnel of the petitioner is not indicative of an individual supervising professional, managerial or supervisory staff. The petitioner neglected to describe the function of any of the petitioner's staff although requested to do so by the director. The brief position description of the two full-time employees and two part-time employees provided on appeal is not adequate to support a conclusion that these individuals are managerial or supervisory other than in title or that they perform professional duties. Furthermore, as the director specifically requested information regarding the duties of all the petitioner's employees and the petitioner was provided an opportunity to provide it and failed to do so, the information submitted on appeal will not be considered. The appeal will be adjudicated based on the record of proceedings before the director. Matter of Soriano, 19 I&N Dec. 764 (BIA 1988).

Upon review, the petitioner has not provided sufficient evidence to conclude that the beneficiary will be employed in a primarily managerial or executive capacity. The descriptions of the beneficiary's job duties are general and fail to sufficiently describe his actual day-to-day duties. The record does not adequately demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to

be a manager or executive simply because the beneficiary possesses an executive or managerial title. The petitioner has not established that the beneficiary has been employed in either a primarily managerial or executive capacity.

The burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, the petitioner has not sustained that burden.

ORDER: The appeal is dismissed.